

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BAYCHAR, INC., et al.,)	
)	
Plaintiffs)	
)	
v.)	Docket no. 01-CV-28-B-S
)	
FRISBY TECHNOLOGIES, et al.,)	
)	
Defendants)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SINGAL, District Judge.

Presently before the Court are Defendant Outlast Technology, Inc.’s (“Outlast’s”) Motion to Compel Arbitration and Dismiss or Stay These Proceedings (Docket #6) and a Motion to Stay Proceedings Pending Arbitration filed by the other four Defendants (Docket #8). Also filed, but not yet under advisement, is Plaintiffs’ Motion for Preliminary Injunction (Docket #4). The Court treats Outlast’s Motion as three separate motions: a Motion to Compel Arbitration, a Motion to Stay Proceedings against it, and a Motion to Dismiss. Based on the following discussion, the Court GRANTS Defendant Outlast’s Motion to Compel Arbitration (Docket #6) and its Motion to Stay Proceedings against it pending arbitration (Docket #6). The Court DENIES Defendant Outlast’s alternate Motion to Dismiss (Docket #6). The Court DENIES the Motion to Stay Proceedings Pending Arbitration filed by the other Defendants (Docket #8). The Court DENIES in part Plaintiffs’ Motion for Preliminary Injunction (Docket #4) to the extent that it demands relief against Defendant Outlast.

Because a stay pending arbitration is an interlocutory injunction, the Court must

make findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

I. FINDINGS OF FACT

The facts relevant to the instant motions are not in dispute.

A. The Parties

1. Plaintiff Baychar is an individual residing in Carrabassett, Maine.¹
2. Plaintiff Baychar, Inc. is a corporation organized pursuant to Maine law with a principal place of business in Farmington, Maine.
3. Similarly, Plaintiff Baychar, LLC is a Maine corporation with a principal place of business in Farmington, Maine.
4. For the sake of simplicity, the Court refers to the Plaintiffs collectively as the single entity, “Baychar.”
5. Defendant Outlast Technology, Inc. (“Outlast”) is a corporation organized pursuant to the laws of Colorado, with a principal place of business in Boulder, Colorado. Outlast was formerly known as Gateway Technologies, Inc.
6. Defendant Frisby Technologies, Inc. (“Frisby”) is a corporation organized under the laws of Delaware with a principal place of business in Winston-Salem, North Carolina.
7. Defendant Schoeller Textil AG (“Schoeller Textil”) is a Swiss company with a principal place of business in Schweiz, Switzerland.
8. Defendant Schoeller Textil USA, Inc. (“Schoeller Textil USA”) is a corporation organized pursuant to the laws of Vermont, with a principal place of business in

¹ Baychar is the full name of the individual Plaintiff.

Essex Junction, Vermont. At times, the Court refers to Schoeller Textil and Schoeller Textil USA together as the “Schoeller companies.”

9. Defendant Schoeller Frisby Technologies GmbH (“the Schoeller Frisby Joint Venture”) is a joint venture between Defendants Frisby and Schoeller Textil. The Schoeller Frisby Joint Venture is based in Switzerland.²

B. The Alleged Circumstances

10. Baychar is in the business of inventing fabrics for clothing designed to facilitate the evaporation of moisture away from the body. Baychar claims that by 1995 it had invented a “Three-Layered Composite” liner, that combines

(1) a moisture transfer material, such as polyester, selected for its moisture vapor transferring properties (the “MVT material”); (2) a layer of foam, such as an open cell foam selected for its breathable qualities and its enhanced ability to transfer moisture (the “foam”); and (3) a non-woven material, selected for its absorbent qualities and breathable structure (the “non-woven”).

(Am. Compl. ¶ 14 (Docket #3).)

11. When the Three-Layered Composite liner is sewn into, for example, a boot, it enhances the transfer of moisture away from the foot.
12. In 1995 Baychar decided to try to improve the foam layer of the Three-Layered Composite by imbuing it with “reversible enhanced thermal properties,” achievable by treating the foam layer with certain substances known as “phase change materials” (“PCMs”).
13. The Triangle Research and Development Corporation (“Triangle”) holds a patent

² Originally, another company, Schoeller USA, Inc., was a defendant in this action. Since filing the Amended Complaint, however, Plaintiffs have dismissed their claims against Schoeller USA, Inc.

- to PCM technology.
14. In 1995 Triangle began licensing the right to manufacture and sell certain PCM-treated products to Defendants Outlast and Frisby.
 15. In 1998 Frisby began sublicensing certain PCM technology to the Schoeller companies.
 16. In 1996 Baychar purportedly developed a new type of Three-Layered Composite that incorporated a foam layer treated with PCMs.
 17. Between 1996 and 2000, Baychar filed several patent applications based on different designs that it was developing.
 18. In 1997 and 1998 Baychar approached numerous companies, such as Defendants Outlast, Frisby, Schoeller Textil and Schoeller Textil USA, to discuss Baychar's plans to manufacture PCM-treated Three-Layered Composites.
 19. Hoping to maintain secrecy surrounding the development of the liners, Baychar entered into a separate confidentiality agreement with each Defendant.
 20. Most pertinent to the present motions, Baychar and Outlast signed a mutual confidentiality agreement (the "Baychar-Outlast Confidentiality Agreement") on February 28, 1997.
 21. During the contacts between Baychar and Defendants, parties had access to some proprietary information and trade secrets possessed by other parties.
 22. Baychar alleges that starting no later than 1998, Defendants Outlast, Frisby, Schoeller Textil and Schoeller Textil USA colluded in using Baychar's proprietary information and trade secrets to produce and market PCM-treated Three-Layered Composites.

23. Baychar also claims that in April of 2000 Defendants Frisby and Schoeller Textil formed the Schoeller Frisby Joint Venture, which also allegedly has been using Baychar's proprietary information to manufacture and sell PCM-treated Three-Layered Composites.
24. On April 11, 2000, the United States Government issued Baychar Patent No. 6,048,810 ("the '810 Patent"). Baychar characterizes the '810 Patent as securing in Baychar all rights to a PCM-treated Three-Layered Composite. The Composite possesses reversible enhanced thermal properties by virtue of either (1) treating the foam layer with PCMs, or (2) inserting a PCM membrane between the MVT material and the foam layer.
25. In February of 2001 Baychar initiated this action against Defendants.
26. Baychar accuses Defendants of violating the several confidentiality agreements (Count I), infringing on the '810 Patent (Count II), and misappropriating trade secrets (Count III).
27. Denying Baychar's allegations, each of the Defendants have filed counterclaims against Baychar stating claims such as tortious interference with business relationships and that the '810 Patent is invalid.
28. Accusing Baychar of misappropriating Outlast's proprietary information and using it to obtain the '810 Patent, Defendant Outlast has made six counterclaims against Baychar: the First Counterclaim seeks a declaration that the '810 Patent is void and unenforceable, the Second Counterclaim seeks equitable title to the '810 Patent, the Third Counterclaim is for breach of the Baychar-Outlast Confidentiality Agreement, the Fourth Counterclaim alleges that Baychar has

violated the Trade Secrets Act, the Fifth Counterclaim accuses Baychar of tortiously interfering with contractual relationships, and the Sixth Counterclaim is for misappropriation of Outlast's proprietary information.

29. Schoeller Textil and Schoeller Textil USA each have filed a Third Party Complaint (Docket #s 18 & 19) against Charles T. J. Moore, a former employee of Schoeller Textil USA who is now a vice president of Baychar, Inc. Claiming that Moore entered into confidentiality agreements with Baychar on behalf of the Schoeller companies when he knew that he lacked the authority to enter into such contracts, the Schoeller companies seek indemnification from Moore on Counts I and III of Plaintiffs' Complaint.

C. The Baychar-Outlast Confidentiality Agreement

30. The Baychar-Outlast Confidentiality Agreement states in part:

[Outlast] and Baychar hereby agree to exchange Proprietary Information for the specific purpose of discussions relating to a possible commercial venture. The Parties agree that no right, title or interest in and/or to a Party's Proprietary Information shall be granted to the other Party by virtue of this Agreement.

(Baychar-Outlast Confidentiality Agreement § 2.1 (Docket #6, Attach. A).)

31. Another portion of the Baychar-Outlast Confidentiality Agreement states:

Neither Party shall disclose or permit any of their respective recipients to disclose any of the other Party's Proprietary Information. Neither Party shall use or permit any of their respective recipients to use any of the other Party's Proprietary Information for any purpose other than the purposes of this Agreement.

(Baychar-Outlast Confidentiality Agreement § 3.1 (Docket #6, Attach. A).)

32. The Baychar-Outlast Confidentiality Agreement also states:

The Parties acknowledge and agree that the other Party would be irreparably harmed if any of its Proprietary Information were to be disclosed to third parties, and further agree that each Party shall have the right to seek and obtain injunctive relief upon any violation of this Section 3.1, in addition to all of the rights and remedies available at law or in equity.

(Baychar-Outlast Confidentiality Agreement § 3.1 (Docket #6, Attach. A).)

33. Another section of the Baychar-Outlast Confidentiality Agreement reads:

Any controversy or claim under or in relation to this Agreement, or any modification thereof, shall be resolved by binding arbitration using the “General Commercial Arbitration Rules” of the American Arbitration Association which are in effect at the time of arbitration. Judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof. Such arbitration shall be held in Denver, Colorado.

(Baychar-Outlast Confidentiality Agreement § 4.8 (Docket #6, Attach. A).)

The Court refers to this provision as the “arbitration clause.”

34. In addition, another clause reads:

The Parties agree that this Agreement contains the entire understanding and Agreement between the Parties with respect to the subject matter hereof, and supersedes all previous communications, proposals, representations, and agreements, whether oral or written, relating to the subject matter hereof. This Agreement shall not be construed against the drafting Party solely because of the submission of the Agreement to the other Party. Each Party has had an opportunity to consult with its own legal counsel and has not relied upon representations or warranties of the other Party except as set forth in this Agreement.

(Baychar-Outlast Confidentiality Agreement § 4.12 (Docket #6, Attach. A).)

II. CONCLUSIONS OF LAW

35. All of Plaintiffs’ claims against Defendant Outlast are “under or in relation to” the Baychar-Outlast Confidentiality Agreement.

36. Thus, pursuant to the arbitration clause of the Baychar-Outlast Confidentiality Agreement, Plaintiffs and Defendant Outlast must proceed to arbitration on all of their claims.
37. To obtain a preliminary injunction regarding an arbitrable dispute, a movant must show that the preliminary injunction would serve to maintain the status quo in order to facilitate the arbitration. See Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986).
38. The status quo is that Defendant Outlast allegedly has been producing and selling PCM-treated Three-Layered Composites for the past two and one-half years, apparently without Plaintiffs taking any action to prevent Outlast from doing so.
39. Thus, a preliminary injunction enjoining Outlast from producing or selling certain of its products would not preserve the status quo.
40. Rather, if the Court were to consider the merits of Plaintiffs' Motion for Preliminary Injunction against Outlast, the Court effectively would be preempting the arbitrator's role.
41. In addition, the arbitrator has the authority to issue preliminary injunctive relief.
42. If the Court were to issue a preliminary injunction against Defendant Outlast, the Court would be interfering with the arbitration rather than facilitating it.
43. Therefore, it would be inappropriate for the Court to consider the merits of Plaintiffs' Motion for Preliminary Injunction to the extent that it applies to Defendant Outlast.
44. Plaintiffs, however, may proceed in this judicial forum against the remaining Defendants – Frisby, Schoeller Textil, Schoeller Textil USA and the Frisby

Schoeller Joint Venture – for purposes of the Motion for Preliminary Injunction.

III. DISCUSSION

The Court offers the following discussion to explain its legal conclusions.

A. Scope of the Arbitration Clause

Congress enacted the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq., to guarantee the enforcement of private contracts by which parties agree to arbitrate disputes rather than litigate them. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). The main goal of establishing the FAA was to put arbitration contracts on “the same footing as other contracts.” See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 271 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989)). Congress favored safeguarding arbitration agreements because arbitration of disputes tends to avoid “the costliness and delays of litigation.” Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). The enactment of the FAA was “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

Based on the federal policy liberally favoring arbitration, most questions are left to the jurisdiction of an arbitrator. One question, however, exists outside this federal policy, and remains within the purview of the courts: whether or not the parties actually agreed to arbitrate the dispute in the first place. See, e.g., Painewebber Inc. v. Elahi, 87

F.3d 589, 595-96 (1st Cir. 1996) (citing First Options v. Kaplan, 514 U.S. 938, 942-44 (1995)). In other words, it is the role of the Court to determine whether this case is “arbitrable.” See McCarthy v. Azure, 22 F.3d 351, 354 (1st Cir. 1994) (“‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’”) (quoting AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986)).

When determining whether the parties agreed to arbitrate, federal courts utilize general state law principles of contract law. See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 19 (1st Cir. 1999). In doing so, courts look to state common law principles applicable to contracts in general, but not state laws that single out arbitration contracts. See, e.g., Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 684-86 (1996) (holding that FAA preempts a Montana statute that establishes special requirements for the formation of arbitration agreements).

In analyzing contractual language pursuant to general common law principles, the Court first looks to the plain language of the agreement. In this case the arbitration clause is facially broad in scope. (See Baychar-Outlast Confidentiality Agreement § 4.8 (“Any controversy or claim under *or in relation to* this Agreement, or any modification thereof, shall be resolved by binding arbitration....”) (emphasis added) (Docket #6, Attach. A).) Count I of the Amended Complaint, breach of the Baychar-Outlast Confidentiality Agreement, certainly is a claim “under or in relation to” the Agreement.

Count III accuses Outlast and the other Defendants of misappropriating trade secrets “by acquiring them through improper means (including breaches of theirs and others’ duties to maintain their secrecy).” (Am. Compl. ¶ 60 (Docket #3).) Based on the

filings to date, it appears clear that Baychar and Outlast mutually decided to meet and discuss business opportunities. During these contacts Baychar and Outlast had some access to each other's proprietary information. To protect each other's interests during these contacts, both parties signed the Confidentiality Agreement. If Outlast did misappropriate Plaintiffs' proprietary information, Outlast did so by breaching the Confidentiality Agreement. Thus, Count III falls under the category of "[a]ny ... claim under or in relation to" the Baychar-Outlast Confidentiality Agreement.

Count II claims that Defendant Outlast has infringed upon Plaintiffs' patent rights. Plaintiffs argue that their claim of patent infringement is divorced from Counts I and III and that it cannot be read to be "under or in relation to" the Confidentiality Agreement. The Confidentiality Agreement says nothing specifically regarding patents or patent infringement.

Once the Court finds that the parties have agreed to arbitrate a claim, "[i]t is at this point in the analysis that the federal presumption of arbitrability comes into play." Bangor Hydro-Elec. Co. v. New England Tel. & Tel. Co., 62 F. Supp. 2d 152, 158 (D. Me. 1999). "This presumption dictates that 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration....'" Brennan v. King, 139 F.3d 258, 264 (1st Cir. 1998) (quoting Moses H. Cone, 460 U.S. at 24); see also AT&T, 475 U.S. at 654 ("[i]n the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.") (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960)); McCarthy, 22 F.3d at 354-55 ("a party seeking to substitute an arbitral forum for a

judicial forum must show, at a bare minimum, that the protagonists have agreed to arbitrate *some* claims.”) (emphasis in original).

In the instant action, the arbitration clause is, as noted above, broad on its face. It does not specify that certain types of disputes are non-arbitrable while others must be arbitrated. See, e.g., Painewebber, 87 F.3d at 596 (comparing open-ended arbitration clause to the clause analyzed in AT&T, 475 U.S. at 645, which exempted from arbitration several types of disputes). If the arbitration clause specifically stated that it did not apply to patent infringement cases, Plaintiffs’ argument would prevail. Rather, the clause makes arbitrable *any* “claim under or in relation to” the Baychar-Outlast Confidentiality Agreement. See, e.g., McCarthy, 22 F.3d at 358 (noting that the phrase “arising under” is narrower than other possible phrases such as “arising out of or relating to”).

Furthermore, the factual allegations that serve as the foundation to Plaintiffs’ breach of contract and misappropriation claims are the same facts that support Plaintiffs’ patent infringement claim: Plaintiffs’ allegations that Defendants have been using proprietary information developed by Baychar to produce and market their own PCM-treated Three-Layered Composites. The Confidentiality Agreement was created to protect the parties’ proprietary information; it is the alleged abuse of proprietary information that gives rise to the patent infringement claim. Thus, the Court finds that the Confidentiality Agreement and the patent infringement claim are related to one another, and therefore the Court concludes that all of Plaintiffs’ claims against Defendant Outlast should proceed to arbitration pursuant to the arbitration clause of the Baychar-Outlast Confidentiality Agreement. Similarly, Defendant Outlast’s counterclaims are based on the same factual controversy: who misappropriated whose intellectual property.

The Court finds that all of Defendant Outlast's counterclaims against Plaintiffs should proceed through arbitration as well.

B. Whether Court Should Hear Plaintiffs' Preliminary Injunction Arguments vs. Outlast

In the Motion for Preliminary Injunction, Plaintiffs request that the Court enjoin Defendants from making, distributing or selling Three-Layered Composites. Defendant Outlast has moved the Court to either stay the case pending arbitration, or dismiss the case entirely. In particular, Defendant Outlast would like the Court to deny Plaintiffs' Motion for Preliminary Injunction against Outlast, and leave it to the arbiter to determine whether or not a preliminary order is appropriate. Once arbitration has begun, the arbiter could issue a binding order, akin to preliminary injunction, on Plaintiffs' behalf.³ Plaintiffs argue that even if the merits of the case against Defendant Outlast should be arbitrated, they nonetheless are entitled to be heard on their request for a preliminary injunction prior to arbitration.

In Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986), the First Circuit held that a district court has the authority to issue a preliminary injunction regarding an arbitrable dispute so as "to preserve the status quo pending arbitration." See id. at 51. Most circuit courts of appeal have ruled similarly. See, e.g., Am. Express Fin. Advisors, Inc. v. Thorley, 147 F.3d 229, 231 (2nd Cir. 1998); Specialty Bakeries, Inc. v. Halrob, Inc., 129 F.3d 726, 727 (3rd Cir. 1997); IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524, 527 (7th Cir. 1997); PMS Distrib. Co. v. Huber & Suhner, A.G., 863 F.2d 639, 642

³ The rules and procedures adopted by the American Arbitration Association ("AAA"), which Baychar and Outlast agreed to use in the arbitration clause, state that, "The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." (American Arbitration Association, Commercial Dispute Resolution Procedures R-36(a), p. 27 (2000) (Docket #17, Attach.).)

(9th Cir. 1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985). But see Peabody Coalsales Co. v. Tampa Elec. Co., 36 F.3d 46, 48 (8th Cir. 1994) (generally, a district court should not issue preliminary injunction regarding an arbitrable dispute).

Defendant Outlast argues that Plaintiffs' request for a preliminary injunction would not maintain the status quo, and therefore the Court should not consider Plaintiffs' preliminary injunction arguments, but should allow all of Plaintiffs' claims against Outlast to go directly to arbitration. Although Plaintiffs have not rebutted this "status quo" argument, their earlier filings make clear that they would like the Court to consider their Motion for Preliminary Injunction prior to the inception of arbitration proceedings.

In Teradyne, the plaintiff corporation filed an arbitration demand against the defendant corporation for breach of contract, seeking damages of approximately four million dollars. See id. at 45. Soon after the defendant company opposed the arbitration demand, it announced that it would cease operations. See id. The defendant company sold all of its assets, and then placed the proceeds in a bank account dedicated to paying off creditors. See id. Concerned that those proceeds might vanish, the plaintiff corporation sought a preliminary injunction from a federal district court to order the defendant to set aside four million dollars or otherwise preserve its assets pending the outcome of the arbitration. See id. Finding that plaintiff had a substantial likelihood of success on the merits, that it would suffer immediate and irreparable harm if an injunction did not issue, and that the balance of hardships favored the plaintiff, the district court determined that the plaintiff corporation was entitled to preliminary injunction, notwithstanding the fact that the merits of the case ultimately would be decided by an

arbitrator. See id. at 52-57.

The First Circuit upheld that ruling because the congressional intent behind the FAA was to enforce arbitration agreements between parties. See id. at 51 (citing Dean Witter, 470 U.S. at 220).

We believe that the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process.

Teradyne, 797 F.2d at 51. Thus, it appears critical to the Teradyne holding that if the plaintiff had not been able to obtain a preliminary injunction, then it would have been likely that the defendant would have depleted its coffers by paying off creditors, leaving nothing for the plaintiff if and when it finally prevailed at arbitration. See id. Such a situation not only would have been unfair to the plaintiff, but also it would have contravened the parties' intent when they agreed to settle their disputes through arbitration. See id.

Defendant Outlast argues that according to Plaintiffs' own allegations, the status quo from 1998 to the present day has been that Defendant Outlast has been manufacturing and selling PCM-treated Three-Layered Composites. Indeed, this is not a situation in which Defendant Outlast is on the verge of causing Plaintiffs irreparable injury. See Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 151 (1st Cir. 1998) (reversing preliminary injunction in an arbitrable dispute in part because it did not preserve the status quo). Rather, Outlast allegedly has been wronging Plaintiffs for a period of at least two and one-half years.

The reasoning behind Teradyne is that there is a strong federal policy favoring arbitration, and that if the changing circumstances of an arbitrable controversy threaten to

obviate the role of the arbitrator, a court can issue a preliminary injunction to protect the status quo in order to ensure that the arbitration serves a productive purpose. See Bercovitch, 133 F.3d at 151; Teradyne, 797 F.2d at 51. In the instant case, however, if the Court were to issue a preliminary injunction, the Court essentially would be supplanting the role of the arbitrator. If the Court held a hearing on the preliminary injunction motion against Outlast, the Court would have to analyze the specifics of Plaintiffs' claims in order to make a determination regarding the likelihood of success on the merits.⁴ If the Court were to issue an injunction against Defendant Outlast, the Court would make findings of fact and conclusions of law and enjoin the company from producing or selling some of its products. Thus, the Court would be sending to arbitration a case already decided to a large degree, thereby interfering with the arbiter's attempts to decide the merits of the controversy. The First Circuit has held that district courts should order preliminary injunctions to preserve the status quo for the purpose of facilitating the arbitration of claims. See Bercovitch, 133 F.3d at 151; Teradyne, 797 F.2d at 51. If the Court were to enter a preliminary injunction against Defendant Outlast, the Court would be interfering with the arbitration rather than facilitating it.

Because Plaintiffs' Motion for Preliminary Injunction does not seek to maintain the status quo, and because deciding the Motion against Defendant Outlast would usurp the role of the arbitrator, the Court finds that it would be inappropriate to consider Plaintiffs' arguments regarding the Motion for Preliminary Injunction. Thus, the Court denies the Motion for Preliminary Injunction to the extent that it relates to Defendant

⁴ To grant a motion for preliminary injunction, the Court must consider (1) the likelihood of success on the merits, (2) immediate and irreparable harm, (3) the balance of the hardships, and (4) the public interest. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996) (outlining the requirements of a preliminary injunction in a case not involving arbitrable matters).

Outlast. Furthermore, Defendant Outlast is entitled to a stay of these proceedings pending the final resolution of arbitration. Because of the involvement of other Defendants, the Court elects to stay these proceedings against Defendant Outlast rather than dismiss the action against it.⁵

C. Whether the Court Should Stay Proceedings Against the Other Defendants

Defendants Frisby, Schoeller Textil, Schoeller Textil USA and the Schoeller Frisby Joint Venture (collectively “the Frisby/Schoeller Defendants”) have filed a Motion to Stay Proceedings (Docket #8) pending final resolution of the Baychar-Outlast arbitration. In particular, the Frisby/Schoeller Defendants would like the Court to delay ruling on the preliminary injunction motion until a later time.

The Frisby/Schoeller Defendants argue that the arbitration will settle the dispute over who actually owns the rights to produce and sell PCM-treated Three-Layered Composites as between Baychar and Outlast. Baychar claims that Outlast stole information from Baychar, Outlast claims that Baychar stole information from Outlast, and hopefully the arbitration will sort out where lies the truth. According to the Frisby/Schoeller Defendants, the factual dispute potentially is determinative of all of the pending claims and counterclaims between Baychar and Outlast. At the heart of all of these claims is the question: who is the rightful owner of the intellectual property regarding PCM-treated Three-Layered Composites.

The Frisby/Schoeller Defendants intimate that if Defendant Outlast is declared the

⁵ Also in its Motion to Compel Arbitration, Defendant Outlast demands attorney fees for the expense of having to file the Motion. Because the case has not come to a final conclusion, and because the demand for attorney fees may be a matter best left to the arbiter, the Court defers to a later time Defendant Outlast’s requests for attorney fees related to the filing of its Motion to Compel Arbitration.

rightful owner during the arbitration proceeding, then Plaintiffs clearly will have no right to either the '810 Patent or the intellectual property, thereby destroying Plaintiffs' claims against the Frisby/Schoeller Defendants. The Frisby/Schoeller Defendants assert that "[t]he potential waste of judicial resources, the burden of unnecessary expenses on the [Frisby/Schoeller Defendants], and unfairness of potentially having to defend twice on the same alleged intellectual property are apparent in this situation." (Defs. Mot. to Stay Proceedings ¶ 5 (Docket #8).)

The Court disagrees. First, the Court does not consider it a waste of resources to execute its obligation to hear controversies over which it has subject matter jurisdiction. Second, although the Frisby/Schoeller Defendants characterize defending themselves in federal court as "unnecessary expenses," undoubtedly every defendant before every tribunal harbors a similar sentiment. Just because defending oneself in court takes money and time does not substantiate a motion to stay. Third, the Frisby/Schoeller Defendants fail to convince the Court that it is unfair that they may have to go through with this action. By complaining of the "unfairness of potentially having to defend twice," the Court assumes that the Frisby/Schoeller Defendants mean they would rather not proceed through (1) a preliminary injunction hearing and (2) a possible trial on the merits, when at the end of the day an arbitrator may find that Plaintiffs do not own the intellectual property at issue.

If not for the arbitration clause in the Baychar-Outlast Confidentiality Agreement, there would be no question that this case should proceed forward against the Frisby/Schoeller Defendants. By going through arbitration with Outlast, Plaintiffs are not imposing greater burdens on the Frisby/Schoeller Defendants than if there was no

arbitration agreement. Rather, by opposing the Frisby/Schoeller Defendants' Motion to Stay, Plaintiffs are burdening themselves; instead of going through arbitration against one Defendant, Plaintiffs will be arbitrating their claims at the same time that they are litigating this action against the other Defendants. The Frisby/Schoeller Defendants cannot characterize Plaintiffs as creating more work for them than is normally commensurate with a lawsuit.

Perhaps, however, the Frisby/Schoeller Defendants mean that they find it unfair that they may have to (1) go through this litigation as the arbitration proceeds, and (2) then have to recraft their arguments and introduce new evidence once the arbitration is completed. If the arbiter eventually finds against Plaintiffs, that likely would impact Plaintiffs' claims to intellectual property rights vis-à-vis the Frisby/Schoeller Defendants. By the same token, if Plaintiffs succeed at arbitration, that could impact the arguments made by the Frisby/Schoeller Defendants in the instant action. Thus, before this litigation's final outcome, it may be useful and relevant for the Court to review any determination made by the arbitrator.

A final outcome by the arbitrator, however, is not due anytime soon. Plaintiffs claim that they are entitled to immediate equitable relief. It does not seem fair that because Plaintiffs must proceed against one Defendant through arbitration, they should have to wait to be heard on their preliminary injunction motion against the other Defendants. Therefore, the Court finds that it should not stay this action before resolving Plaintiffs' Motion for Preliminary Injunction against the Frisby/Schoeller Defendants. Once the Court determines whether or not it will issue a preliminary injunction, at that point the parties may renew their requests for a stay, which the Court will consider at that

time.

IV. CONCLUSION

Based on the foregoing, the Court GRANTS Defendant Outlast's Motion to Compel Arbitration (Docket #6). The Court GRANTS Defendant Outlast's Motion to Stay Proceedings against it pending arbitration (Docket #6). The Court ORDERS Plaintiffs and Defendant Outlast to engage in arbitration pursuant to the Baychar-Outlast Confidentiality Agreement on an expedited basis. Furthermore, the Court ORDERS Plaintiffs and Defendant Outlast to update the Court periodically on the progress of the arbitration and to report to the Court promptly upon the conclusion of arbitration.

The Court DENIES Defendant Outlast's Motion to Dismiss (Docket #6). The Court DENIES, IN PART and WITHOUT PREJUDICE, Plaintiffs' Motion for Preliminary Injunction (Docket #4) to the extent that it demands relief against Defendant Outlast. The Court DENIES the Motion to Stay Proceedings Pending Arbitration filed by Defendants Frisby, Schoeller Textil, Schoeller Textil USA and the Schoeller Frisby Joint Venture (Docket #8).

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 26th day of July 2001.

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	(See above)
	[COR]

HOWARD J. CASTLEMAN, ESQ.
(See above)
[COR LD NTC]
JOHN C. WYMAN, ESQ.
(See above)
[COR]

BAYCHAR, Individually	PHILLIP D. BUCKLEY
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